

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL J. FRYE and U.S. POSTAL SERVICE,
POST OFFICE, Dallas, TX

*Docket No. 98-863; Submitted on the Record;
Issued August 15, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error.

On December 17, 1991 appellant, then a 37-year-old mailhandler, filed a notice of occupational disease and claim for compensation alleging that he sustained a repetitive hand injury performing the duties required in his federal employment. The Office accepted the claim for bilateral carpal tunnel syndrome and approved surgery for a bilateral carpal tunnel release. On October 15, 1993 the Office also authorized appellant to undergo left CMC arthroplasty for treatment of left thumb osteoarthritis. Appellant was issued a schedule award for a 19 percent permanent impairment to the left arm.

Appellant received compensation for disability from November 8, 1991 to February 7, 1994, during which time he was assigned to a light-duty job for four hours per day. On February 8, 1994 appellant accepted a position as a modified mailhandler for eight hours per day. The Office issued a decision on June 23, 1994 finding that the limited-duty job fairly and reasonably represented appellant's wage-earning capacity.

Between November 8, 1991 and June 29, 1994, appellant filed several CA-8 forms, claiming wage loss for his absence from work due to medical treatment and medical appointments related to his hand condition.

By letters dated November 16 and January 14, 1994, January 27 and 30 and February 27, 1995, the Office advised appellant that there was insufficient medical evidence of record to support the dates and hours claimed for wage loss.

In a decision dated April 11, 1995, the Office denied compensation for intermittent periods of disability between November 8, 1991 and June 1, 1994.¹

On September 27, 1995 appellant filed another CA-8 form for intermittent periods of wage loss between January 5, 1994 and October 20, 1995.

In a December 21, 1995 letter, the Office advised appellant that the evidence was insufficient to establish that he had medical appointments or received treatment for his work-related hand condition during his scheduled work hours.

Appellant requested a hearing, which was held on March 13, 1996. At the hearing appellant testified that, from December 1992 through March 13, 1993, as one of his assignments as a mailhandler, he was required to push wire containers weighing in excess of 300 pounds. He noted that he had been under a 10- to 15-pound lifting restriction and that pushing wire containers in excess of his lifting restriction caused pain and swelling in his hands. Appellant acknowledged, however, that he had no medical evidence to document that he was disabled due to his accepted work condition on the days claimed.

In a decision dated May 30, 1996, an Office hearing representative affirmed the Office's April 11, 1995 decision.

The Office next issued a decision on April 11, 1996, denying compensation for the period June 2, 1994 to October 20, 1995.²

By letter dated April 9, 1997, appellant requested reconsideration of the April 11, 1996 decision. The Office denied modification following a merit review of the record on April 17, 1997.

In a decision dated April 22, 1997, the Office upon its own motion modified the April 11, 1996 decision to reflect that appellant was entitled to leave buy back authorization for 64 hours of leave between the period January 17 through February 3, 1994. The Office noted that the remaining period between February 4, 1994 and October 20, 1995 was still denied for lack of corroborating medical evidence.

¹ The Office found appellant eligible for \$2,319.71 gross compensation, representing 205 hours of leave used between November 8, 1991 to October 29, 1993.

² The Office noted that it had already denied compensation for certain periods of claimed wage loss between January 5 and June 1, 1994.

In an Office “Customer Visit Record” dated May 19, 1997, an Office claims examiner noted that appellant requested reconsideration of the April 22, 1997 decision.³

By letter dated May 27, 1997, appellant requested reconsideration of the decision dated May 30, 1996 by the Office hearing representative.

In a decision dated October 16, 1997, the Office advised appellant that his May 27, 1997 reconsideration request was not considered to be timely filed within one year of the Office’s May 30, 1996 decision because the Office did not receive the reconsideration request until June 2, 1997, two days after the filing deadline. The Office further noted that appellant failed to present evidence or argument demonstrating clear evidence of error.

In a separate decision also dated October 16, 1997, the Office denied appellant’s request for a merit review of the Office’s April 22, 1997 decision on the grounds that appellant’s evidence submitted in support of the reconsideration request was not relevant to the issue of the case.

On October 30, 1997 appellant requested reconsideration of the denial issued on October 16, 1997. Appellant submitted a copy of an express mail overnight delivery slip postmarked May 29, 1997, indicating that a document was to be delivered to the Office on May 30, 1997 prior to 12:00 p.m. A handwritten notation states “delivering May 30, 1997 11:05 a.m.”

In a decision dated November 14, 1997, the Office denied appellant’s request for a merit review of the October 16, 1997 decision, noting that appellant failed to submit new evidence or legal argument in support of his claim. The Office further noted that, while appellant submitted an overnight express mail slip to establish that his reconsideration request of the earlier May 30, 1996 was timely filed, the Office’s long-standing policy was to rely on the date of receipt as the indication of timeliness.

Appellant subsequently filed an appeal with the Board.

The Board’s jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.⁴ On appeal appellant argues that his request for reconsideration of the Office’s merit decision dated May 30, 1996 was timely filed.

The Board finds that appellant’s reconsideration request was timely filed based on the postmark of the express mail slip.

³ In conjunction with the reconsideration request, appellant submitted a May 1, 1997 report from his treating physician, Dr. Harry H. Orenstein, a Board-certified plastic surgeon, who noted that appellant was last seen in his office on April 29, 1997. Dr. Orenstein stated that appellant suffered from right radial nerve entrapment related to his working condition and sustained by repetitive stress disorder, documented since September 1995. He stressed the need for surgery and continuing medical care for appellant’s condition.

⁴ See 20 C.F.R. § 501.3(d)(2).

In the instant case, appellant attempted to support timely filing of his reconsideration request dated May 27, 1997 by submitting a copy of an express mail slip with a postmark of May 29, 1997 to establish that it was timely filed within one year of the Office's May 30, 1996 decision. The Office addressed appellant's evidence in its November 14, 1997 decision and determined that because appellant's reconsideration request was not date-stamped as received by the district Office until June 2, 1997 it could not be considered timely filed under "long-standing policy."

The Board notes, however, that the procedure manual, section 2.1602.3(b)(1) sets forth guidelines for determining the timelines of a reconsideration request as follows:

"The [claims examiner] should review the file to determine whether the application for reconsideration was filed within one year of the contested decision. As 20 C.F.R. § 10.138 does not state a method of establishing timeliness, it has been administratively determined that the test stated at 20 C.F.R. § 10.131(a) for assessing the timeliness of hearing requests should be used. Timeliness, is thus determined by the postmark on the envelope, if available. Otherwise, the date of the letter itself should be used."

The Board considers the express mail receipt to be the equivalent of a postmark, which makes the request timely. Because the Office's November 14, 1997 decision is at odds with section 21602.3(b)(1), the Board finds that the Office erred in determining that appellant's reconsideration request postmarked May 29, 1997 was not timely filed within one year of the Office's May 30, 1996 decision. The Board, therefore, remands this case to the Office for further consideration under 5 U.S.C. § 8128 based on appellant's timely reconsideration request.

The decisions of the Office of Workers' Compensation Programs dated November 14 and October 16, 1997 are hereby vacated and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, D.C.
August 15, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member